Derickson Company, Inc. *and* **Rosemary Fitzgerald** *and* **Nancy J. Phillips.** Cases 18-CA-7306(E) and 18-CA-7576(E)

11 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

DECISION AND ORDER

On 28 September 1983 Administrative Law Judge Russell M. King Jr. issued the attached decision. The Applicant filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

It is hereby ordered that the application of the Applicant, Derickson Company, Inc., Minneapolis, Minnesota, for an award under the Equal Access to Justice Act is dismissed.

[1] We find it unnecessary to decide whether, as the judge concluded, the General Counsel's actions in setting aside a settlement agreement and issuing a complaint based in part on a previously withdrawn charge were "within the Board's prevailing precedents at the time." We find that the General Counsel advanced in good faith a legal position that at least made the question of success a close one under then-existing law. This is sufficient to preclude a recovery of attorney's fees under the Equal Access to Justice Act. *Shellmaker, Inc.*, 267 NLRB 20 (1983).

DECISION

Equal Access Under Justice Act

RUSSELL M. KING JR., Administrative Law Judge. The procedural history of these two consolidated cases is somewhat unique. No initial decision was ever issued. On June 23, 1981, Rosemary Fitzgerald filed a charge in Case 18-CA-7306 (Case 1) with Region 18 of the Board in Minneapolis alleging that Derickson Company, Inc. (the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when it discharged her and employees Macken and Frost, and further charging that the Company engaged in other conduct in violation of Section 8(a)(1) of the Act.[1] Subsequently, that portion of the charge in Case 1 which alleged the three improper discharges was withdrawn, a settlement was reached regarding the remaining violations of Section 8(a)(1) of the Act, and the Company was required to, among other things, post a notice to employees, which it did. There was complete compliance with that settlement agreement.

One Nancy Phillips, who had given the Board a sworn statement during its investigation of Case 1, notified the Board in late January 1982 that substantial portions of that sworn statement were false. Phillips had been employed by the Company and had been discharged on January 8, 1982. On February 4, 1982 Phillips filed a charge against the Company in Case 18-CA-7576 (Case 2) alleging that the Company had discharged her in violation of Section 8(a)(1) and (3) of the Act and had engaged in other conduct in violation of Section 8(a)(1) of the Act. On May 5, 1982, Phillips filed an amended charge in Case 2, withdrawing the allegation that she was unlawfully discharged, but alleging that on February 11, 1982, the Company engaged in conduct violative of Section 8(a)(1) of the Act. Based on Phillips' new allegations and affidavit, and her new charge in Case 2, on May 21, 1982, the Regional Director, who acts on behalf of the Board's General Counsel, issued an order revoking approval of and vacating the settlement agreement in Case 1, and revoking approval of the withdrawal of that portion of the charge in Case 1 involving the three discharged employees. At the same time the Regional Director also ordered that the two cases be consolidated and issued a consolidated complaint. On September 16, 1982, the Regional Director issued a further order in the consolidated cases amplifying the reasons for his actions, indicating that he had been apprised of further and newly discovered evidence in Case 1, and of evidence that the Company had committed subsequent unfair labor practices of the same type as those covered in the settlement agreement in Case 1, and the cases were set for hearing. The new consolidated complaint alleges that the Company discharged employees Fitzgerald, Macken, and Frost in violation of Section 8(a)(1) and (3) of the Act, improperly promised employees wage increases, interrogated employees, and refused and thereafter conditioned the writing of a letter of recommendation upon receipt of an apology from an employee for her support of the Union, in violation of Section 8(a)(1) of the Act.

On September 2, 1982, the Company filed a motion to dismiss the consolidated complaint and a memorandum in support of that motion, and on October 12, 1982, the Company filed a supplemental memorandum in support of the motion. The Region made no response to the motion or either memorandum. In support of the motion the Company argued that the Regional Director had im-

[1] The pertinent parts of the Act (29 U.S.C. 151 et seq.) provide as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition or employment to encourage or discourage membership in any labor organization . . . .

. . . .

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

properly set aside the settlement agreement and revoked the approval of the withdrawal request in Case 1 because the Company had not violated the terms of the settlement agreement or committed any subsequent unfair labor practices. The Company further argued that the settlement agreement in Case 1 barred litigation of all presettlement conduct, including the discharge allegations which had previously been withdrawn, adding that the Regional Director failed to establish that he had newly discovered evidence sufficient to justify revocation of his approval of the withdrawal of the discharge allegations. On October 28 and 29, 1982, I heard evidence regarding the consolidated complaints in Minneapolis, Minnesota. The General Counsel not having responded to the earlier motion for dismissal by the Company, at that hearing I restricted evidence and testimony to the issues raised in the Respondent's motion to dismiss. That is, I generally restricted evidence and testimony to that which would support the Region's actions, including the reinstatement of the three discharges in Case 1, the granting of the request for withdrawal of that portion of the original charge alleging the discharges, and to the newly discovered evidence which included evidence and testimony that the Company had allegedly violated the general terms of the settlement agreement in Case 1 by engaging in subsequent and similar actions of misconduct in violation of Section 8(a)(1) of the Act. I felt that it was necessary to initially hear only that evidence and testimony in order to rule on the Company's motion to dismiss the consolidated complaint. Had such evidence and testimony supported the Company's motion, the granting of the same on the record at the October hearing would have initially disposed of the entire matter, subject to exceptions by the General Counsel.[2] In the pleadings herein the General Counsel, in retrospect, admitted that he may have been remiss in failing to respond to the motion to dismiss, but on November 15, 1982, the General Counsel filed a request for special permission to appeal my restrictions on the evidence to the Board. On or about November 14, 1982, the Company filed with the Board a memorandum in opposition to the General Counsel's request for special permission to appeal from my ruling. On December 1, 1982, the Board reversed my ruling restricting the evidence and directed me to permit the introduction of all evidence and testimony from all parties in both cases. The Company subsequently filed with the Board a motion for reconsideration of its ruling en banc, and on January 6, 1983, the Board denied that motion. The Board also remanded the case back to me for further appropriate action consistent with its order of December 1, 1982. Prior to the scheduling of a further hearing in the cases and on December 26, 1982, the Board issued a decision holding that Section 10(b) of the Act precludes reinstatement of a withdrawn charge more than 6 months after the events giving rise to such charge.[3] On March 15, 1983, and pursuant to that decision the General Counsel filed a motion with me to withdraw the consolidated complaint, to dismiss the charge in Case 2, to dismiss the charge in Case 1 insofar as it applied to the three discharged employees, and to reinstate the settlement agreement entered into in 1981 in Case 1. The General Counsel's reason for requesting dismissal of the charge in Case 2 was that the alleged violation was isolated and de minimis.[4] The motion was unopposed and on May 5, 1983, I entered an order granting the motion of the General Counsel.

On June 7, 1983, the Company filed with the Board an application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA) and the implementing rules and regulations of the Board.[5] The Board thereafter referred the matter to me for appropriate action. On July 5, 1983, the General Counsel filed a motion to dismiss the fee application, which motion was denied by me by order entered on August 3, 1983. On September 2, 1983, the General Counsel filed his answer to the Company's application for fees and thus the issue was finally joined on the application under EAJA.[6] The fee application requests an award of attorney's fees in the amount of $9,018.75 in fees and $251.48 in expenses.[7] Counsel for the Company argue in their application that the position of the General Counsel throughout the case was not reasonable in law or fact and thus the issuance of the consolidated complaint was not "substantially justified" under EAJA.

Analysis

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified. . . ." Congress described the "substantially justified" as follows:

> The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and in fact, no award will be made.[8]

Congress further indicated that no adverse inferences were to be drawn from the fact that the Government did not prevail:

> The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.[9]

[2] The term "General Counsel," as used here, refers to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[3] *Winer Motors*, 265 NLRB 1457 (1982). This case overruled the Board's earlier decision in *Silver Bakery Inc. of Newton*, 150 NLRB 421 (1964).

[4] The General Counsel here again cited *Winer Motors, Inc.*, supra.

[5] Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. Section 504; Section 102.143 et seq. of the Board's Rules and Regulations.

[6] The General Counsel requested a further hearing in the matter, which request is hereby denied.

[7] By later revision the Company seeks further fees and expenses in pressing its EAJA application.

[8] S. Rep. 96-253, 96th Cong. 1st Sess. et seq; House Rep. 96-1418, 96th Cong. 2d Sess. at 10.

[9] S.Rep. 96-253, supra at 7; H.Rep. 96-1418, supra at 11.

Section 102.144(a) of the Board's Rules and Regulations likewise places the burden of proof on the General Counsel to show that he was substantially justified in issuing the complaint, and that its position in the proceeding was reasonable in law and fact. The Board has further held that it is immaterial that the General Counsel may not have established a prima facie case of a violation.[10] However, for the General Counsel's position to be substantially justified within the meaning of Section 102.144(a), the General Counsel must present evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct.[11]

A considerable body of law has been built up by the Board regarding settlements and the withdrawal and reinstatement of charges. A settlement disposes of all issues involving presettlement conduct unless the prior actions of violations were unknown to the General Counsel, not readily discoverable by investigation of the General Counsel, or specifically reserved from the settlement agreement.[12] Although there is authority for setting aside a settlement agreement and reinstating a charge because of newly discovered evidence, the Board has held that if such evidence was "available" prior to the settlement it is not considered as "newly discovered evidence," and the General Counsel is not a favorite litigant before the Board in this respect in such cases.[13] The Board has also held that it discourages the multiple litigation of issues which should have been presented in an earlier proceeding and which were known at the time to the Charging Party.[14] Further, the Board's general rule is to not "go behind" a settlement agreement where the employer has not breached the agreement but has complied with it, and has not since engaged in independent unfair labor practices.[15] In 1964 the Board held that the General Counsel has virtually unlimited discretion to proceed on charges as he deems fit in the exercise of his office.[16] The Board found that the General Counsel's action in reinstating a withdrawn charge on the basis of newly discovered evidence after the 6-month limitation period for filing a charge set out in Section 10(b) of the Act was proper. As indicated earlier, Board law on the subject remained the same until December 16, 1982, when the Board held to the contrary, that is, that a properly filed charge which is withdrawn by the charging party with the consent of the General Counsel cannot be reinstated beyond the normal 6-month limitation period set forth in Section 10(b) of the Act.[17]

In this case the General Counsel asserts that the reason for excluding the three discharged employees from the complaint in Case 1 centered around the Company's lack of knowledge of the union activities at its facility and by its employees at the time of the discharges. The General Counsel describes this evidence of knowledge as the "missing link" which was ultimately furnished by former employee Nancy Phillips when she later came forth and recanted significant portions of her original investigative affidavit given to the Board in Case 1. When Phillips came forward she both gave a second and new affidavit to the Board and additionally filed a charge which constituted the complaint in Case 2. Her charge in Case 2 alleged both her unlawful discharge in violation of 8(a)(1) and (3) of the Act and the unlawful interrogation of her by the Company's president and chief executive officer Vernon Wexler on February 11, 1982. The complaint in Case 2 alleges no unlawful discharge of Phillips but does contain the interrogation allegation in violation of Section 8(a)(1) of the Act.[18] I heard the testimony of former employees Nancy Phillips, Mackin and the Company's president Wexler on October 28 and 29, 1982. At that time both of the affidavits of Phillips were admitted into evidence and Phillips testified as to her knowledge of the union activities at the facility and that she had reported the union's activities to Wexler prior to the discharge of the three employees in Case 1. Wexler himself denied the testimony of Phillips and the significant portion of the testimony of Mackin.[19]

In order for the Company to successfully recover fees and expenses in this case under EAJA, I must find that the actions of the General Counsel in this case were either unreasonable in law or fact. I reluctantly can find neither in this case. The General Counsel initially asserted that he withdrew approval of the withdrawal of that portion of the charge in Case 1 that alleged the three unlawful discharges, and subsequently issued the consolidated complaint in this case, for two primary reasons. First the General Counsel recited that Nancy Phillips' disclaimer of portions of her first affidavit and her new revelations regarding knowledge on the part of the Company constituted "newly discovered" evidence which permitted the reinstatement of the entire charge in Case 1, and the withdrawal of approval of the settlement agreement. The General Counsel secondly argues that said withdrawal of the settlement agreement and the reinstatement of the charge and resulting consolidated complaint was based on the new unfair labor practice violative of 8(a)(1) of the Act which was grounded in Phillips' charge filed February 4, 1982, further indicating the new allegation that these new alleged unfair labor practices violated the terms of the settlement agreement and thus constituted legal grounds for setting the agreement aside. I find that these actions on the part of the General Counsel were within the Board's prevailing precedents at the time. The Company argues in effect that the General Counsel at least exceeded the bounds of reasonable discretion in the case by proceeding to unearth the past completely based on the sole evidence of

[10] *Enerhaul, Inc.*, 263 NLRB 890 (1982).

[11] *Jim's Big M*, 266 NLRB 665 (1983).

[12] *Cambridge Taxi Co.*, 260 NLRB 931 (1982); *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978); and *Steves Sash & Door Co.*, 164 NLRB 468 (1967).

[13] *Union Electric Co.*, 219 NLRB 1081 (1975).

[14] *Jefferson Chemical Co.*, 200 NLRB 992 fn. 3 (1972).

[15] *St. Francis Hotel*, 260 NLRB 1259 (1982); *United Dairy Co.*, 146 NLRB 187 (1964); and *Henry I. Siegel Co.*, 143 NLRB 386 (1963).

[16] *Silver Bakery Inc.*, supra.

[17] *Winer Motors*, supra.

[18] It should be noted, as stated in the General Counsel's answer to the Company's fee application, that the Regional Director was guided throughout in this case by advice received from the General Counsel's Division of Advice.

[19] I of course had no chance or opportunity in this case to make credibility findings, which was my intent before ruling on the Company's original motion to dismiss the complaint.

one individual who had admittedly lied in the past. I must admit that I do have some empathy in this case for the Company in this regard. It could accurately be said that the entire matter would never have come up had it not been for Nancy Phillips. However, the General Counsel must deal with such individuals and witnesses at arms length. The General Counsel, through the Regional Director and his staff, has the authority to investigate charges and thereafter issue complaints. However, the task and responsibility of judging credibility do not lie with the General Counsel or his Regional Directors, but with the triers of fact, legislatively established to consider such matters. Any rule to the contrary would most certainly be a denial of due process to at least one party to proceedings of this nature before the Board. It would also impose a very difficult, if not impossible, task on the General Counsel or his Regional Directors in fulfilling their obligations under the Act and the Board's Rules and Regulations in investigating charges and issuing complaints. The Company further points out that, to add insult to injury, the General Counsel in the end requested and obtained dismissal of the allegation in Case 2 as being de minimis in nature. In this regard the Company points out that it was the 8(a)(1) allegation in Case 2 that in part prompted the Regional Director to withdraw the settlement agreement and issue the consolidated complaint. Although this does appear to be somewhat inconsistent, the General Counsel does have that unquestionable right.[20] It is not my right, or within my authority or responsibility, to judge the diplomacy or discretion of the actions of the General Counsel in this or any other case I may hear when such actions are within the bounds of reasonableness in law and fact pursuant to EAJA and Board precedent, no matter how close the General Counsel comes to these boundaries. The General Counsel's decision to dismiss the discharge allegations of Case 1 and to reinstate the original settlement agreement after the Board's reversal of precedent on December 16, 1982, can also not be challenged. The Board's decision was clear-cut regarding the reinstatement of withdrawn charges after the 6-month limitation.[21]

The Company's ire in this case, whether well founded or not, is best directed to former employee Nancy Phillips. The General Counsel in this case chose to proceed in this case in a manner supported by prevailing law. I must admit that some aspects of this case were distasteful to me. However, our system of justice is not perfect, although it is the best known to date. The imperfections in this system, in this case, caused a financial loss in attorneys' fees and expenses by the Company. I regretfully can find no way of compensating the Company for that loss within the framework of the laws and precedents which I am duly bound to apply and follow in this case.[22]

On the foregoing findings and on the entire record and prevailing law, I make the following

CONCLUSIONS OF LAW

1. That the Applicant (the Company) prevailed in a significant and discrete substantive portion of these consolidated cases.

2. That the Company is an eligible applicant to receive an award under EAJA and the Board's Rules and Regulations.

3. That the fees and expenses claimed herein in the Company's application are reasonable and do not exceed the limits or bounds established by the Act or the Board's Rules and Regulations.

4. That the fees and expenses claimed herein in the Company's application, as amended, are allowable under EAJA, the Board's Rules and Regulations, and other applicable case law.

5. That the Company's fee application, as amended, in all relevant respects complies with the Board's Rules and Regulations regarding such matters.

6. That the position of the General Counsel in this case was reasonable in law and fact and that the General Counsel was substantially justified in withdrawing approval of the withdrawal of a portion of the charge in Case 1, in issuing the consolidated complaint in Case 1 and Case 2, in ultimately requesting dismissal of the allegations of unlawful discharge in Case 1 and the allegations in the complaint in Case 2, and in requesting the reinstatement of the settlement agreement in Case 1.

On the basis of the foregoing findings and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

It is hereby ordered that the application for attorneys' fees and expenses filed herein by the Respondent Employer be, and the same is, dismissed.

---

[20] The General Counsel, in this regard, appears to argue that since the three allegations of wrongful discharge in Case 1 required dismissal as of December 16, 1982, when the Board handed down its decision in *Winer Motors*, supra, then and thereafter the new alleged unfair labor practice did become de minimis. This may or may not be true, and of course the General Counsel in no way is required to justify such action herein, clearly having such right and authority.

[21] *Winer Motors*, supra. The decision was by the full Board with two out of the five members dissenting.

[22] The Company's motion to withhold its net worth exhibit from public disclosure is hereby granted, pursuant to Sec. 102.47 of the Board's Rules and Regulations.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.